PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: ***Ayangma v. The Saltwire Network Inc.***, 2020 PECA 1 Date: 20200103
Docket: S1-CA-1426
Registry: Charlottetown

BETWEEN:

NOËL AYANGMA

APPELLANT

AND:

THE SALTWIRE NETWORK INC., operating as The Guardian, BARBARA McKENNA and RYAN ROSS

RESPONDENTS

Before: Chief Justice David H. Jenkins
Justice Michele M. Murphy
Justice John K. Mitchell

Appearances:

Noël Ayangma, on his own behalf, the Appellant

David Hutt, counsel for the Respondent

Place and Date of Hearing	Charlottetown, Prince Edward Island October 22, 2019
Place and Date of Judgment	Charlottetown, Prince Edward Island January 3, 2020

Written Reasons by:
Justice John K. Mitchell

Concurred in by:
Chief Justice David H. Jenkins
Justice Michele M. Murphy

DEFAMATION

The discoverability principle applies to s.15 of the ***Defamation Act***. That is, the time begins to run from the date the defamatory matter has been discovered or ought to have reasonably been discovered by the person defamed.

Every publication of a libel is a new libel. The fact that defamatory material remains online does not mean that the limitation period starts anew each day.

CIVIL PROCEDURE

Rule 39(4) states that an affidavit for use on a motion may contain statements of the deponent's information and belief if the source of the information and the fact of the belief is specified. This rule is intended to allow hearsay evidence where the deponent states the source of the information and the fact that he believes. This allows the court to assess the reliability of the hearsay and helps determine the weight the evidence is to be given.

Authorities Cited:

CASES CONSIDERED: Pylot et. al. v. Cariou et. al., 1987 CanLII 4825 (SKQB); ***Brannigan v. Seafarers' International Union of Canada***, [1963] 42 D.L.R. (2d) 249 (BCSC); ***Ralston v. Fomich***, [1992] CanLII 1652 (BCSC); ***R. v. Watson***, [1996] 108 CCC (3d) 310 (Ont. C.A.); ***R. v. Candir***, 2009 ONCA 915; ***HZPC Americas Corp. v. Havenlee Farms Inc.***, 2017 PECA 20; ***Hryniak v. Mauldin***, 2014 SCC 7; ***MacPherson v. Ellis***, 2005 PESCAD 10; ***McQuaid v. Govt. of Prince Edward Island***, 2017 PECA 21; ***Marques v. National Bank of Canada***, 2019 PECA 8; ***Mullin v. Mullin*** (1992), 96 Nfld. & P.E.I.R. 77 (PESCAD); ***McNaughton Automotive Ltd. v. Cooperators General Insurance Co.***, 2008 ONCA 597; ***Brad-Jay Investments Ltd. v. Szijjart***, 2006 O.J. No. 5078 (ONCA); ***2386240 Ontario Inc. v. Mississauga (City)***, 2019 ONCA 413; ***Oliver v. Severance***, 2007 PESCAD 21; ***Griffin v. Summerside (City)***, 2010 PECA 19; ***Weiss v. Sawyer***, 2002 CanLII 45064 (ONCA); ***Shtaif v. Toronto Life Publishing Co. Ltd.***, 2013 ONCA 405; ***Carter v. BC Federation of Foster Parents Assn.***, 2005 BCCA 398; ***AARC Society v. Canadian Broadcasting Corporation***, 2019 ABCA 125; ***John v. Ballingall*** , 2017 ONCA 579; ***Bhaduria v. Persaud***, [1998] 40 O.R. (3d) 140 (ONSC); ***Kim v. Dongpo News*** , 2013 ONSC 4426; ***Young v. Bella***, 2006 SCC 3; ***Roy v. Ottawa Capital Area Crimestoppers***, 2018 ONSC 4207; ***Ayangma v. NAV Canada***, 2001 PESCAD 1; ***Grossman v. CFTO-T.V. Ltd. et al.*** (1982) 39 O.R. (2d) 498 (ONCA); ***Crookes v. Newton***, 2011 SCC 47; ***Grant v. Torstar***, 2009 SCC 61; ***Ayangma v. CBC***, 2000 PESCTD 86; ***Ayangma v. Wyatt***, 2001 PESCTD 4; ***Ayangma v. Eastern School Board***, 2002 PESCA 12; ***Ayangma v. CBC et al.***, 2005 PESCAD 26;

Ayangma v. French School Board and Gabriel Arsenault, 2008 PESCTD 39; ***Ayangma v. Government of Prince Edward Island & Others***, 2005 PESCTD 25; ***Ayangma v. Metro Credit Union & Ors.***, 2011 PESC 18.

STATUTES CONSIDERED: Legal Profession Act, R.S.P.E.I. 1984, Cap. L-6.1; ***Defamation Act***, R.S.P.E.I. 1984, Cap. D-5, ss.12, 14, 15; ***Libel and Slander Act***, R.S.O. 1990, ss.5, 6; ***Constitution Act, 1867***, s.2(b); ***Judicature Act***, R.S.P.E.I. 1988, Cap. J.2-1, s-ss. 5(3), 60(1); ***Statute of Limitations***, R.S.P.E.I. 1988, S-7.

RULES CONSIDERED: Prince Edward Island Rules of Civil Procedure, Rules 39, 39(4), 57, 57.01(1)(e), 61.06(2).

TEXTS CONSIDERED: Brown, Raymond E.: **The Law of Defamation in Canada**, 2nd Ed. (1994, Thomson Canada Ltd.); **Students Oxford Canadian Dictionary**, 2nd Ed. (Oxford University Press, Don Mills, Ontario, 2007); Donald J.M. Brown, Q.C.: **Civil Appeals** (Thomson Reuters (formerly Canvasback Publishing), Toronto, ON 2009)).

Reasons for judgment:

MITCHELL J.A.:

[1] Noël Ayangma appeals the decisions of the motions judge dismissing his claim in defamation against the respondents and seeks leave to appeal her assessment of costs.

FACTS

[2] On March 30, 2016, a judge of the Supreme Court of Prince Edward Island struck out Ayangma's claim against the English and French School Boards on the basis that: (1) it disclosed no reasonable cause of action, and (2) it was frivolous, vexatious, and an abuse of process (***Ayangma v. FLSB and ELSB***, 2016 PESC 12, at para.26, the "School Board case").

[3] On April 29, 2016, a different judge of the Supreme Court of Prince Edward Island released his decision in ***Ayangma v. Charlottetown (City)***, 2016 PESC 16 (the "Charlottetown case"). This decision came about as a result of a motion made by the defendant City to prohibit Ayangma from acting for his son in a civil suit against the City. The City argued that Ayangma was practising law contrary to the ***Legal Profession Act***, R.S.P.E.I. 1984, Cap. L-6.1. The motions judge agreed (para.31), and granted an order prohibiting Ayangma from any further involvement in the case.

[4] On the 16th day of May, 2016, the **Guardian** newspaper published an article

written by its employee Ryan Ross entitled "*Court: He's not a Lawyer*". The story was posted to the **Guardian's** website on the same day under the headline "*Judge rules man can't represent son in court*". This article was a factual account of the court decision in the Charlottetown case (the "Ross article").

[5] On May 17th, 2016, the **Guardian** published an opinion column authored by its employee Barbara McKenna entitled "*Vexatious Litigant still not a Lawyer*". The same column was posted online the same day under the headline "*Opinion: Justice Wayne Cheverie rules Noel Ayangma not a lawyer*" (the "McKenna article").

[6] On May 17, 2016 when the McKenna article was posted to the **Guardian** website, a hyperlink was added to the Ross article which allowed the reader to access the McKenna article.

[7] In April 2017, the **Guardian** business name and assets became the property of the respondent Saltwire Network Inc.

[8] Some ten months after publication of the articles, on the 28th day of July, 2017 the Prince Edward Island Court of Appeal overturned the Charlottetown case and remitted the matter back to the Supreme Court of Prince Edward Island to consider the matter afresh and to decide whether or not the court would exercise its inherent jurisdiction to allow Ayangma to act as an agent in court for his son (***Ayangma v. Charlottetown (City)***, 2017 PECA 15). Two months later the Prince Edward Island Court of Appeal overturned the School Board case on the basis of insufficient reasons. The matter was sent back to the Supreme Court for a re-hearing (***Ayangma v. FLSB and ELSB***, 2017 PECA 18).

[9] On October 12, 2017, the **Guardian's** website infrastructure and archived web content was partially migrated to a new platform owned by Saltwire. Archived opinion pieces, including the McKenna article, were deleted rather than migrated. All articles, including the Ross article, were marked "*updated September 30, 2017*" denoting that they had been migrated effective the end of the previous month. No changes were made to either the McKenna or the Ross article except that the hyperlink was removed. The URL address remained the same throughout as did the content.

[10] Ayangma states that he became aware of the articles October 8, 2017 when a friend brought them to his attention. He provided notice to the **Guardian** pursuant to s.14 of the ***Defamation Act***, R.S.P.E.I. 1974, Cap. D-5, by way of a 105-page package of documents.

[11] On October 30, 2017, Ayangma commenced this action in defamation which

he amended November 30 to include a claim in negligence. The amended statement of claim alleges that the articles were initially published May 16, 2016 and republished September 30, 2017. He claims that the articles are "*not only an unfair and inaccurate report of the proceedings publically heard before the court, but they were also false and defamatory and contained seditious and blasphemous comments that the Defendants knew or ought to have known of falsity, inaccuracy, and defamatory meanings"* (para.14, amended statement of claim as written), and further that the respondents "*knew or ought to have known of the facts showing that (Ayangma) was not a 'vexatious litigant', they nonetheless opted to misrepresent these facts, by making seditious blasphemous comments which were aimed at disparaging and defaming (Ayangma), labelling him 'vexatious litigant'"* (para.21, amended statement of claim).

[12] The respondents' statement of defence pleads the limitation period set out in s.15 of the ***Defamation Act***, that Ayangma, with reasonable diligence, would have been aware of the articles within the six month time period, that there is no cause of action as against Ross, as well as the defences of fair comment and responsible communication.

[13] On July 26, 2018, Saltwater filed a motion in Supreme Court for summary judgment and alternatively, for security for costs. Ayangma responded August 17th with his application for summary judgment.

[14] At the motion August 23rd, the parties argued the limitation period, whether there was a cause of action against Ross, defence of fair comment and security for costs.

[15] The motions judge granted Saltwire's motion for summary judgment based on her finding that the limitation period set out in s.15 of the ***Defamation Act*** barred Ayangma's claim (***Ayangma v. Saltwire***, 2018 PESC 48).

[16] The motions judge awarded costs to Saltwire on a partial indemnity basis. Saltwire filed a submission and bill of costs with the court. Ayangma declined the invitation to file a response to Saltwire's bill of costs. The motions judge's decision on costs is published in ***Ayangma v. The Saltwire Network et al.***, 2019 PESC 22. Ayangma appeals the decision barring his claim and seeks leave to appeal and, if granted, appeals the decision on costs.

PRELIMINARY MATTERS

[17] The appeal hearing commenced with Ayangma providing to the Court and Saltwire's counsel an 83-page document entitled "*Presentation*". It was, he said, a

written version of what would be his oral argument. He was filing it as an aid to the Court so as to enable the Court to better follow his argument.

[18] Counsel for Saltwire had no notice of this document. After a brief recess, counsel acknowledged that Ayangma is a self-represented litigant but pointed out that the "*Presentation*" is more like a reply factum and our **Rules of Civil Procedure** make no provision for a reply factum.

[19] Counsel reluctantly consented to Ayangma filing the document as an aid to the court but objected to anything in the document which was not contained in Ayangma's factum. He specifically pointed out paragraph 148 of the Presentation which adds a new alleged defamatory statement contained in the McKenna article. That statement is as follows:

> Also, he thinks he's a lawyer. Unfortunately for the taxpayers of P.E.I., it seems he is also training his son well in how to bungle up the courts with frivolous claims, so there will probably be a second – generation Ayangma who, when not selling cocaine, may be filing his own motions.

[20] Ayangma replies that this statement is not new as it was in the McKenna article and hence Saltwire knew of its existence.

[21] There are several reasons why Ayangma should not be permitted to raise this new allegation. The ***Defamation Act*** requires that a plaintiff provide notice of his intention to bring an action which notice must specify the language complained of (s.14). Ayangma's notice made no reference to this statement.

[22] The language complained of must be pleaded in the statement of claim ***(Pylot et. al. v. Cariou et. al.***, 1987 CanLII 4825 (SKQB). This statement was not pleaded in the statement of claim nor was it argued before the motions judge. It is now far too late to raise it.

[23] In addition, Saltwire had no notice of the new allegation. It would therefore be unfair to allow Ayangma to argue this new statement having sprung it upon Saltwire with no notice. I would not allow Ayangma to raise this new statement on this appeal.

[24] Counsel for Saltwire identified what he called a central problem in this case; Ayangma's inability to grasp the distinction between legal tests and make other distinctions that lawyers make every day, for example, the difference between fact and opinion, fact and belief, fact and comment, objective versus subjective, and the law. That, says Saltwire, plays itself out in every element of this case.

[25] No one doubts Ayangma's sincerity. He has at times become emotional as he

speaks of what he perceives as his inability to work on Prince Edward Island and the forces that he perceives are stacked against him. He says he has to go almost 3,000 kilometers away to make a living and that is not fair. Ayangma has been a persistent litigator in this province, and elsewhere, over the course of the past 20 plus years, he attended one year of law school (although he did not successfully complete it, ***Charlottetown*** case, at para.27), and he has thereby learned, if only by process of osmosis, some law. However, I believe that the observations of Saltwire's counsel have merit. Ayangma struggles to understand legal distinctions as well as such fundamental legal concepts as what constitutes evidence, relevance, materiality, and the meanings of certain words at law. This theme, I'm afraid, will repeat itself throughout the course of this judgment.

[26] Several examples follow:

– The concept of evidence

[27] Ayangma argues that the motions judge did not consider "*all the pleadings and the evidence*" and therefore she erred. He argues that the motions judge "*rejected several paragraphs [of his affidavit] despite being based on his [Ayangma's] beliefs"* and that she "*blindly adopted [the affidavit of Wayne Thibodeau] without any hesitation even though there was nothing to back the facts contained therein."* (para. 13 Ayangma's amended factum). He then cites an example of the motions judge's error in that she rejected paragraph four of his affidavit which reads as follows:

> That I also verily believe that there is a big legal difference between someone found to have conducted frivolous and 'vexatious' proceedings and a 'vexatious' litigant as suggested by the defendant Barb McKenna.

[28] This argument is based on a fundamental misconception of Rule 39 and what constitutes evidence. Rule 39 provides that evidence on a motion or application may be given by affidavit. All of the evidence in this motion was given by affidavit. Rule 39(4) states that an affidavit for use in a motion "*may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified*." This rule is intended to allow hearsay evidence where the deponent states the source of the information and the fact that he believes it. This allows the Court to assess the reliability of the hearsay and helps determine the weight the evidence is given. This rule does not make one's belief evidence unless, of course, one's belief is a logically relevant fact that tends to prove or disprove an issue in dispute.

[29] Paragraph four of Ayangma's affidavit is not evidence, it is argument and has no place in his affidavit. The motions judge was correct to reject it as evidence because it

is not evidence.

[30] The first two paragraphs of the Thibodeau affidavit state that he has personal knowledge of the facts contained in his affidavit and where he does not have personal knowledge he states his source. Only one of the 16 paragraphs in the affidavit is not his personal knowledge and that is paragraph 15 wherein the affiant does state the source of his information and the fact of his belief. Thibodeau's affidavit contains admissible, relevant evidence.

[31] Because of Ayangma's fundamental misunderstanding of what constitutes evidence and the meaning of Rule 39, he makes a spurious argument and unfairly accuses the motions judge of "*blindly adopting*" Thibodeau's affidavit. His affidavit is rife with statements of his belief, allegations and argument. Nine of the 20 paragraphs contain expressions of his belief. In fact, there is precious little admissible evidence in his affidavit.

– Relevance and Materiality

[32] Relevance is not a legal concept. It is a matter of everyday experience and commonsense. In ***R. v. Watson***, [1996] 108 CCC (3d) 310 (Ont. C.A.), at pp.323-324, Doherty J.A. wrote that relevance:

> ... requires a determination of whether as a matter of human experience and logic the existence of 'Fact A' makes the existence or non-existence of 'Fact B' more probable than it would be without the existence of 'Fact A'. If it does then 'Fact A' is relevant to 'Fact B'. As long as 'Fact B' is itself a material fact in issue or is relevant to a material fact in issue in the litigation then 'Fact A' is relevant and *prima facie* admissible.

[33] Materiality is a legal concept. Material evidence is evidence that is pertinent, germane or significant to a fact in issue. Evidence is immaterial if the proposition of fact the evidence is offered to prove is not in issue under the prevailing substantive and procedural law (***R. v. Candir***, 2009 ONCA 915, at para. 49).

[34] The evidence before the motions judges was by way of affidavit. Paragraph 12 of Ayangma's sworn affidavit states:

> I also believe that the defendant Saltwire Network Inc. as a publisher of a newspaper 'The Guardian' was negligent in permitting both a disgruntled and disrespectful journalist who is not only facing at all material times, criminal harassment charges and had entered into a recognizance with specific conditions in order to avoid jail time, to publish on line, the type of defamatory materials that she had published about me. See Exhibits B, C and D attached to this affidavit.

[35] Quite apart from the fact that para.12 is argument and not evidence, it is also irrelevant. Exhibit B is what appears to be a letter to the editor published in the **Guardian** on-line version April 15, 2016 entitled "Barb McKenna Disrespectful". It was written by someone unknown to Ayangma and deals with something McKenna wrote and published April 6. The subject matter is unknown.

[36] Exhibit C was an article entitled "Barb McKenna facing criminal harassment charges" published by the **Guardian** on-line August 17, 2016 and Exhibit D is an article entitled "*Criminal harassment charge stayed against Barb McKenna*" published in the **Journal Pioneer** on-line edition October 4, 2016. The harassment charge had nothing to do with Ayangma.

[37] In a defamation case the plaintiff must prove firstly that the remarks were published and secondly that the words are defamatory in their natural and ordinary sense or by way of innuendo. The fact that some unknown reader of the **Guardian** thinks that McKenna was disrespectful when she wrote some unknown article is relevant to nothing. The fact of harassment charges wholly unrelated to Ayangma and the Crown staying those charges is relevant to no material issue in dispute.

[38] It really doesn't matter who wrote the article Ayangma attacks. The issues are whether or not the words are defamatory and if so can Saltwire avail itself of the defence of justification (truth), privilege, or fair comment.

[39] Paragraph 12 of Ayangma's affidavit and his three attachments amount to nothing more than a scandalous and *ad hominem* attack on McKenna. They are wholly irrelevant, immaterial and therefore inadmissible.

– **Seditious and blasphemous**

[40] The pleadings at paras.14 and 21 of the statement of claim allege the articles contain seditious and blasphemous comments. A fair and accurate report of court proceedings is privileged unless it contains something that is of a seditious, blasphemous or indecent nature (s.12 ***Defamation Act***). "*Sedition*" is a noun meaning conduct or speech inciting to rebellion or breach of public order. "*Seditious*" is an adjective. Seditious libel dates back to the days of the Star Chamber when that ancient court began to take the cognizance of political libel and moved to suppress seditious writings (**The Law of Defamation in Canada**, Raymond E. Brown (1994, Thomson Canada), at 8.2). At one time it was considered seditious libel to call someone a communist (***Brannigan v. Seafarers' International Union of Canada***, [1963] 42 D.L.R. (2d) 249 (BCSC)). It is abundantly plain from a review of both articles that there is nothing of a seditious nature in either article.

[41] "*Blasphemy*" is the act or offence of speaking sacrilegiously about God or sacred things. "*Blasphemous*" is an adjective. ***Ralston v. Fomich***, [1992] CanLII 1652 (BCSC), is a case wherein the court stated that '*blasphemy*' is the profane speaking of God or sacred things. There is quite obviously nothing in either article which is blasphemous. Ayangma's use of the terms "*seditious*" and "*blasphemous*" betrays a lack of understanding of these legal terms.

THE ISSUES

[42] The issues to be decided in this case are as follows:

1) Should leave be granted to appeal the costs order?
2) Is the defamation action time barred under the ***Defamation Act***?
   -- Does continuous online availability constitute a new publication each day?
   -- Does the ***Defamation Act*** apply to online publications?
   – Discoverability
3) Did the motions judge fail to consider the negligence pleading?
4) Is the Ross article defamatory? and
5) Is the McKenna article protected by the defence of "*fair comment*"?

STANDARD OF REVIEW

[43] This case is custom-made for a summary judgment ruling. All of the evidence was documentary. There was no *viva voce* evidence and no cross-examination on any of the affidavits. There was no need for the motions judge to make any assessment of credibility. The motions judge had everything necessary to make a fair and just determination of the issues in dispute. On appeal from summary judgment the standard of review is correctness on the question of whether the motions judge applied the appropriate test and palpable and overriding error in the exercise of the powers to weigh evidence, evaluate credibility, and draw inferences from the evidence (***Hryniak v. Mauldin***, 2014 SCC 7; ***HZPC Americas Corp. v. Havenlee Farms Inc.***, 2017 PECA 20, at para.27).

[44] The motions judge applied the correct test for summary judgment. That test was set out by this court in ***MacPherson v. Ellis***, 2005 PESCAD 10, paras.18-19; re-affirmed in ***McQuaid v. Govt. of Prince Edward Island***, 2017 PECA 21, para.12; and ***Marques v. National Bank of Canada***, 2019 PECA 8, at para.23). It is a two-part test. The first part requires the moving party to show there is no material fact in issue which

would create a genuine issue for trial. The second part of the test provides that when the moving party discharges this onus, the responding party must adduce evidence to establish that the position taken in his pleading has a real chance of success. Once the moving party establishes its right to summary judgment by meeting this onus, the responding party assumes the evidentiary burden of showing there is a real chance the position taken in the pleading under attack will succeed thereby negativing the moving party's right to summary judgment.

Issue 1: Should leave be granted to appeal the costs order?

[45] The motions judge granted Saltwire its costs on a partial indemnity basis. She gave the parties the opportunity to agree upon costs. The parties could not agree. Saltwire filed with the court written submissions and a bill of costs. Ayangma declined to make any submission. The motions judge considered the material she had before her and assessed costs at $20,190.59 all in. Ayangma now seeks to appeal the costs on the basis that she wrongfully exercised her discretion. When asked why he declined to make submissions on costs he replied that he feels "*from the bottom of my heart*" that he is not heard in the Supreme Court and "*there are times where I wish there was no court below for me to go to the Court of Appeal where I could be heard.*"

[46] The ***Judicature Act***, R.S.P.E.I. 1988, Cap. J.2-1, provides a right of appeal from any order of the Supreme Court subject to two exceptions: an order of the Supreme Court with the consent of the parties, and an order of the Supreme Court for costs that are in the discretion of the Supreme Court if the appeal is based on the ground that such discretion was wrongfully exercised (s.5(3), ***Judicature Act***). Section 60(1) of the ***Judicature Act*** states as follows:

> Unless otherwise provided by any act, the costs of and incidental to a proceeding authorized to be taken in any court are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[47] The ***Judicature Act*** makes it clear that leave is necessary when the appeal of a costs order is based on the ground that the judge's discretion was wrongfully exercised. An appeal of a costs order on a ground other than wrongful exercise of discretion does not require leave. Therefore, if the appeal is based on an error of law or process or perhaps on whether or not the court had jurisdiction in the first place (***Mullin v. Mullin*** (1992), 96 Nfld. & P.E.I.R. 77 (PESCAD)), then leave is not required.

[48] Leave to appeal a costs order based on a ground of wrongful exercise of discretion should be granted sparingly (***McNaughton Automotive Ltd. v. Cooperators General Insurance Co.***, 2008 ONCA 597, at para.25). The Ontario Court of Appeal

has set a fairly high hurdle for leave. In ***Brad-Jay Investments Ltd. v. Szijjart***, 2006 O.J. No. 5078 (ONCA) (applied in ***2386240 Ontario Inc. v. Mississauga (City)***, 2019 ONCA 413, at para.33), the Ontario Court of Appeal wrote at para.21:

> Leave to appeal a costs order will not be granted save in obvious cases where the party seeking leave convinces the court there are "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion". ...

[49] The application for leave sets out one ground under the heading "*Questions to be answered*". That ground is as follows: "*Did the motions judge wrongfully exercise her discretion by ordering costs that were not only excessive, but that did fully comply with all relevant factors to taken under consideration pursuant to Rule 57 of the* ***Rules of Civil Procedure***" (as written in the application to leave).

[50] Ayangma's argument appears to be that the motions judge erred in allowing travel and hotel disbursements, ($399 and $247 respectively), and thereby committed an error of law: that she failed to properly exercise her discretion because the bill of costs did not "fully accord with the Rule 57 factors": failed to properly exercise her discretion because there was no evidence that she reviewed the relevant court decisions regarding Rule 57 factors and further that the matter was not so complex as to warrant two lawyers.

[51] Ayangma's grounds of appeal are weak. It is true that the rule on Prince Edward Island is that a party is responsible for bringing his own counsel to the table. However, travel and accommodations are permitted where the expense is necessary and properly incurred. One example is where there are no local lawyers with the necessary skills and experience (***Griffin v. Summerside (City)***, 2010 PECA 19, at para.74). Here Saltwire counsel comes from Halifax and is a member of a small group of lawyers across Canada called the Canadian Media Lawyers Association. These are lawyers who deal in the rather complex area of defamation law. There are few to no local counsel with the necessary skills and experience in this area of the law. Saltwire's counsel fits into the exception to the rule.

[52] The decision of the motions judge is thorough. She begins by referencing her authority to assess costs, the Rule 57 factors and the leading caselaw on the relevant factors (***Oliver v. Severance***, 2007 PESCAD 21). She dealt with the background of the case and the fact that the motion and cross-motion lasted one full day. The motion and cross-motion involved two preliminary matters, consideration of the limitation period under the ***Defamation Act***, the law of defamation itself, principle of discoverability and its application to an online publication, the law of summary judgment and the law of security for costs. In addition, she found that contrary to Rule 57.01(1)(e) Ayangma lengthened the proceedings.

[53] A litigant who foregoes the opportunity to make submissions in the Supreme Court in the hopes that he will receive a more sympathetic ear in the Court of Appeal plays a very risky game which the courts will not condone. The time to argue that the costs are excessive was when the matter was before the motions judge. Costs were in her discretion. Whether Ayangma believes it or not he receives a fair hearing in the Supreme Court. Should the Supreme Court make an error of law Ayangma knows only too well the way to the Court of Appeal.

[54] The leave application does not show strong grounds upon which we could find that the motions judge erred in exercising her discretion. I would deny leave to appeal.

Issue 2: Is the defamation action barred under the *Defamation Act*?

[55] Section 15 of the ***Defamation Act*** reads as follows:

> An action against the proprietor or publisher of a newspaper, or the owner or operator of a broadcasting station, for defamation contained in the newspaper or broadcast from the station shall be commenced within six months after the publication of the defamatory matter has come to the notice or knowledge of the person defamed; but an action brought and maintainable for defamation published within that period may include a claim for any other defamation published against the plaintiff by the defendant in the same newspaper or from the same station within a period of one year before the commencement of the action.

- **Does continuous online availability constitute a new publication each day?**

[56] Ayangma argues that the motions judge erred in law and misapplied "*the so-called single publication rule*." To that end he relies on the following cases: ***Weiss v. Sawyer***, 2002 CanLII 45064 (ONCA); ***Shtaif v. Toronto Life Publishing Co. Ltd.***, 2013 ONCA 405; ***Carter v. BC Federation of Foster Parents Assn.***, 2005 BCCA 398; and ***AARC Society v. Canadian Broadcasting Corporation***, 2019 ABCA 125.

[57] Ayangma writes that the British Columbia Court of Appeal in ***Carter*** confirmed what the Ontario Court of Appeal had "*suggested in* ***Weiss***, *holding that as long as the comments remain on line the limitation period would be renewed each time someone accessed the website and read the comments*." (Ayangma's amended factum, para. 56).

[58] ***Carter*** and ***Weiss*** say no such thing. The reasoning in the ***Weiss*** case is, in fact,

fatal to Ayangma's position. ***Weiss*** is authority for the proposition that an online newspaper is still a newspaper and is entitled to the protection of s.5 of the ***Libel and Slander Act***, R.S.O. 1990, which is the equivalent of s.14 of the ***Defamation Act*** of Prince Edward Island. Paragraph 28 of the ***Weiss*** decision deals with two faxes which were not published in the newspaper but which were sent to two individuals. The court wrote that these two faxes represent separate publications and "*every republication of a libel is a new libel*." The ***Weiss*** decision does not say that the limitation period would be renewed each time someone accesses the website and reads the comments.

[59] In ***Carter*** the British Columbia Court of Appeal was dealing with an internet chat room which contained "*a considerable amount of scurrilous material defamatory to*" Carter. The defamatory comment in question was posted online by someone who identified as "*Dberlane*." It was posted on the defendant's website forum. Carter was aware of it in February 2000 and requested that the defendant remove the posting from their website forum. In the Spring of 2002 Carter discovered that the comment was still online on the defendant's forum. She commenced an action. The British Columbia Court of Appeal discussed and rejected the single publication rule. They defined that rule as "*the prevailing American doctrine that the publication of a book, periodical or newspaper containing defamatory material gives rise to but one cause of action for libel, which occurs at the time of the original publication, and that the statute of limitations runs from that date*" (at para.15).

[60] The British Columbia Court of Appeal adopted the prevailing law in Commonwealth countries that each publication of a libel gives rise to a fresh cause of action. However, the British Columbia Court of Appeal did not hold that a limitation period is renewed each time someone accesses a website and reads the comments. Rather, they stated at para.20:

> ... I consider that the trial judge fell into error when he held that the action of the plaintiff was out of time because she had not commenced her action within two years of first learning of the existence of the Dberlane comment. If Ms. Carter can establish that there occurred publications of the offending comment subsequent to the first publication in February of 2000, then her cause of action would not be time barred. ... (my emphasis)

[61] Implicit in that finding is that each day the comment remained online did not start the limitation period afresh. Carter was simply given the opportunity to establish a republication of the comments within the limitation period.

[62] In ***Shtaif***, the third case upon which Ayangma relies, the Ontario Court of Appeal rejected the American single publication rule and agreed with ***Weiss*** that every republication of a libel is a new libel. Therefore, if the same article was published in

different mediums intended for different groups, it amounts to a republication. This case does not say that each day it remains on-line equals a new publication.

[63] One judge of the Alberta Court of Appeal agrees with Ayangma's position. In ***AARC Society v. Canadian Broadcasting Corp.***, 2019 ABCA 125, Wakeling J.A. wrote at para.18:

> ... The law is clear. Every day that defamatory material remains on an internet website a potential defamation action arises. And the limitation period starts with each new communication of allegedly defamatory material. ...

[64] However, a second judge, MacDonald J.A., responded at para. 127 to Wakeling J.A.'s para. 18 comment by stating:

> ... this was not the issue being advanced on appeal. Second, ... it is not a correct statement of the law in Canada.

[65] The third judge of the Alberta Court of Appeal declined to weigh in on the issue because it was not an issue on appeal (para.113).

[66] The position that each day a comment remains online the clock starts afresh has found no favour with any other court in Canada so far as I am aware. If this position was adopted it would mean that there would be a short limitation period for a comment published or broadcast in a newspaper, radio, t.v. (media), a longer one for the same comment published by means other than online and media, and still a longer one for the same comment online. A plaintiff could lie in wait for years, even decades, patiently waiting for the opportune time to attack an unsuspecting defendant for his online comment; a comment that could have been retracted or clarified by the defendant or an apology issued for the benefit of both plaintiff and defendant had the defendant only known that the plaintiff considered it defamatory.

[67] Ayangma, in my view, erroneously cites ***Weiss***, ***Carter*** and ***Shtaif*** as supporting his position because he appears to misunderstand the concept of publishing or republishing comments. The law in Canada is that every publication or republication is a new defamation. In the case at bar the Ross article was published in the paper version of the **Guardian** on May 16, 2016 and republished on the online newspaper on the same day. The McKenna article was published in the paper version of the **Guardian** on May 17 and republished on the online version the same day. The fact that on May 18th a reader could read the paper version of the May 17th **Guardian** and both articles online does not mean they are republished May 18th.

[68] In my opinion the statements of law in **Weiss**, **Carter** *and* **Shtaif** *that every*

republication constitutes a new defamation is the correct law. I do not believe that each day a comment remains online a limitation period starts anew is good law. It does not, in my view, accord with common sense, nor does it accord with the principle of finality. In any event, in my view, the issue of the so-called single publication rule is a red herring.

– **Publication/republication**

[69] All parties agree that the articles were originally published May 16 and May 17, 2016. Ayangma alleges that the articles were republished September 30, 2017. However, the evidence adduced on the motion does not support Ayangma's position. Ayangma's belief and his allegations to the contrary do not constitute evidence. The affidavit evidence of Wayne Thibodeau establishes that the term "*updated September 30, 2017*" simply refers to the fact that the Ross article was migrated to another server effective the end of September, 2017. Nothing was changed in the articles save for the hyperlink which was removed on that day. On the evidence before the motions judge there was no republication. There was no change in URL and therefore no change in how the reader accessed the articles. The publication dates then were May 16 and 17, 2016.

– **Does *Defamation Act* apply to online publications?**

[70] Section 1(c) of the ***Defamation Act*** defines "newspaper" as:

> *a paper containing public news, intelligence or occurrences or remarks or observations thereon printed for sale and published periodically or in parts or numbers at intervals not exceeding 31 days between publication of any two such papers, parts or numbers."*

[71] There is no doubt that the newspaper that lands on a customer's front door in the morning is a newspaper as defined. The question is whether the online version of a newspaper is a newspaper as well. There is also no doubt that the definition of "newspaper" contained in the ***Defamation Act*** came about long before the advent of the internet. Does that mean that an online newspaper is not a newspaper? This issue was dealt with in ***Weiss***. In that case the alleged defamatory statement was published in the newsprint edition of a magazine and online on their internet webpage. The appeal court wrote:

> [24] The Act defines a newspaper in part as a "paper" containing certain categories of information for distribution to the public. I think the word "paper" is broad enough to encompass a newspaper which is published on the internet.

> [25] If I am wrong in my conclusion and the word "paper" is to be given a more restrictive meaning, i.e. the substance upon which a newspaper is ordinarily printed, then arguably s. 5(1) is not available to the defendant. However, such a result would clearly be absurd. It would mean that if an action was commenced against a newspaper, without serving a s. 5(1) notice, it would be barred in relation to the newsprint publication but not so barred in relation to the online publication, unless of course it fell within the definition of "broadcast". The ordinary meaning rule of statutory interpretation articulated by Ruth Sullivan, in **Driedger on the Construction of Statutes**, 3rd ed. (Toronto: Butterworths, 1994) at p. 7 is helpful:
>
> (1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> (2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.
>
> (3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible, that is, it must be one of the words are reasonably capable of bearing.
>
> In my view, the purpose and scheme of the notice provision in the ***Libel and Slander Act*** are to extend its benefits to those who are sued in respect of a libel in a newspaper irrespective of the method or technique of publication. To use the words of Justice Lax, "a newspaper is no less a newspaper because it appears in an online version."

[72] In ***John v. Ballingall*** , 2017 ONCA 579, a rapper sued the defendant for libel as a result of an online article written about him on the **Toronto Star** website. The online article was published December 4, 2013, and in the print edition of the **Toronto Star** December 9, 2013. The rapper argued that the ***Libel and Slander Act*** does not apply to online articles and therefore the limitation periods contained in ss.5 and 6 of the ***Libel and Slander Act*** (the equivalent of ss.14 and 15 of the ***Defamation Act*** of P.E.I.) do not apply. The definition of newspaper in the ***Libel and Slander Act*** of Ontario is as follows:

> "newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or

> principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year.

[73] In ***Ballingall*** the Ontario Court of Appeal agreed with the ***Weiss*** decision, and held that the definition of "*newspaper*" under the ***Libel and Slander Act*** is not restricted to the physical paper (para.23). The reasoning in ***Weiss*** and ***Ballingall*** is persuasive. It would be rather absurd to hold in this case that Ayangma was barred by virtue of s.15 for an action on an article printed in a paper which landed on a person's doorstep but that a different limitation period would apply to the same words published the same day on the online version of the newspaper. Such a determination would ignore the realities of modern life when newspapers are trending more and more towards online versions in order to stay alive. The motions judge made no error relying on the ***Ballingall*** case and adopting the reasoning set forth therein and in ***Weiss***. The reasoning in those cases is self-explanatory.

– Discoverability

[74] Ayangma argues that the motions judge erred when she "*dealt with conflicting evidence on a motion for summary judgement and when she preferred the respondents' evidence including the evidence which was not even substantiated by the pleadings.*"

[75] The motions judge did not deal with conflicting evidence. The motions judge had no need to make, and therefore did not make, a finding of credibility. Rather, she properly dealt with the admissible evidence which was put before her.

[76] The statement of claim indicates that Ayangma became aware of the two articles on October 8, 2017, when he was in British Columbia and was shown the publications by a friend (para.11, amended statement of claim). Saltwire's statement of defence, at para.20, pleads that a person in Ayangma's position, acting with reasonable diligence, would have been aware of the two articles within the time limits prescribed in s.15.

[77] Pleadings are not evidence; nonetheless they frame the issues in dispute. The issue that para.11 of the statement of claim and para.20 of the statement of defence raises is whether or not the knowledge component of s.15 of the ***Defamation Act*** is subjective or objective.

[78] The knowledge component of s.15 is the plaintiff's knowledge of the defamatory articles. If the limitation period begins to run when Ayangma has subjective or actual knowledge, then the limitation period would begin October 8, 2017, and Ayangma would be within the time frame. If however, the knowledge

component of s.15 has an objective component, then the limitation period would begin when the plaintiff knew or ought to have known of the defamatory articles. This was the central issue on the motion and the issue upon which the trial judge's decision turned.

[79] At the motion Ayangma filed an affidavit of his friend François Alain Moussa to support his position that he became aware of the two articles October 8, 2017. Moussa in his affidavit refers to the articles as "*the two pieces of information.*" The relevant part of his affidavit is para.11 where he states:

> That to my biggest surprise, after reading the two pieces of information I found on the internet, I quickly realized that, based on Mr. Ayangma's reaction who appeared to be completely surprised saddn[sic] and shocked to read what was said about him, that Mr. Ayangma was not aware of either pieces of information.

[80] Ayangma also filed his own personal affidavit but nowhere in that affidavit does he state when he became aware of these articles nor does he offer any explanation for why these articles did not come to his attention before October 2017.

[81] The first issue for the motions judge to discern was whether the knowledge component of s.15 was subjective or objective. The motions judge dealt with that issue head on. She relied on and adopted the reasoning of the Ontario Supreme Court in ***Bhaduria v. Persaud***, [1998] 40 O.R. (3d) 140 (ONSC). That case dealt with s. 6 of the ***Libel and Slander Act*** which requires that an action against a newspaper for libel must be commenced within three months after "*the libel has come to the knowledge of the person defamed.*" The language in s.15 of the ***Defamation Act*** is "*after the publication of the defamatory matter has come to the notice or knowledge of the person defamed.*"

[82] In ***Bhaduria*** the alleged defamatory article was written in February 1994 but the action was not commenced until well after three months. The plaintiff argued that he learned of the article long after it was published and commenced his action within three months after the article came to his attention. That court relied on the discoverability principle as applying in cases of limitation periods. The Court wrote:

> This principle has been broadly established since the decision of the Supreme Court of Canada in ***Central Trust Co. v. Rafuse***, [1986] 2 S.C.R. 147, at p.224 .... wherein Justice La Dain stated:
>
> > . . . the judgment of the majority in Kamloops ***[Kamloops v. Nielsen***, [1984] 2 S.C.R. 2] laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought

> reasonably to have been discovered by the plaintiff by the exercise of reasonable diligence.

[83] In ***Shtaif, supra***, the Ontario Court of Appeal wrote at para.42:

> However, the discoverability principle applies to limitation periods under the Act. See, for example, ***Misir v. Toronto Star Newspaper Ltd.*** (1997), 105 O.A.C. 270, at paras. 14-16. The three-month period in s. 6 begins to run when the person defamed knew or could have known about the libel by the exercise of reasonable diligence.

[84] In ***Kim v. Dongpo News*** , 2013 ONSC 4426, the court wrote at para.28:

> The discoverability principle is codified in s. 5 of the ***Limitations Act***. Although not expressly set out in the LSA [***Libel and Slander Act***], it is well-settled law that the discoverability principle also applies to the limitation periods therein.

[85] The motions judge was correct in law, in my view, when she found that the discoverability principle applies to s.15 of the ***Defamation Act***. The evidence relevant to this issue came from two sources: the affidavit of Wayne Thibodeau, and the affidavit of Ayangma. Thibodeau's affidavit stated that he is a journalist by trade and he was with and writing for the **Guardian** newspaper in various roles for over 18 years. His affidavit stated that in his years with the **Guardian** Ayangma had contacted him "*many times to comment on a story we had published or to request we investigate and report on an issue of interest for him*."

[86] His affidavit also stated that he was advised by several newsroom colleagues and he believes that they too were contacted by Ayangma over the years, commenting or responding to stories published in the **Guardian**. Other evidence included Ayangma's own affidavit that the defendants "*are obsessed and eager to publish defamatory materials against me or decisions that go against me in a timely manner, they do not do the same with the same rapidity when I am successful and sometimes they either do forget or ignore to publish my victories even those against them.*" (Para.19, Ayangma affidavit as written)

[87] The motions judge concluded that these weren't comments of someone who pays scant or no attention to the publications in the **Guardian**. She also noted that Ayangma adduced no evidence to explain why he had not found these articles earlier. Applying these facts the motions judge drew the inference that Ayangma knew or ought to have known of these articles within the limitation period set out in s.15. This is a finding of fact and must be reviewed on standard of reasonableness. The motions judge had evidence from which one could reasonably conclude that Ayangma knew or ought to have known of the articles within the limitation period. I can find no

reversible error in the motions judge's findings.

Issue 3: Negligence

[88] Ayangma alleges that the motions judge erred in failing to deal with his claim of negligence which has a longer limitation period. He is correct. She ought to have dealt with this issue. It is, however, an error of no import. Saltwire argues that the negligence claim is simply a dressed up defamation action. I agree.

[89] Ayangma's original statement of claim made no mention of negligence. His amended statement of claim alleges that the respondents had an obsession with him and his family, they republished the articles, that he discovered the articles October 8th, that the articles contained comments that were seditious and blasphemous, the ***Statute of Limitations***, R.S.P.E.I. 1988, S-7, and the discoverability rule amongst other things. Almost all of the amendments related to the defamation claim.

[90] The only real reference to negligence is the claim that Saltwire was negligent because they "*refused to publish in a timely fashion the Court of Appeal decision in the* ***Charlottetown*** *and the* ***School Board*** *cases* (paras.24 and 34, Ayangma's amended statement of claim)*, and that by putting the articles online, the respondent acted negligently* (para.35, Ayangma's amended statement of claim)*.*"

[91] It is possible that an action in defamation and negligence can arise from the same set of facts. However, the necessary elements of negligence must be made out and the damage claimed must be more than reputational damage (***Young v. Bella***, 2006 SCC 3, at para.56; ***Roy v. Ottawa Capital Area Crimestoppers***, 2018 ONSC 4207, at para.53).

[92] The alleged acts of negligence as pleaded do not constitute, at law, negligence. There is no duty on a newspaper to publish the Court of Appeal decisions which overturned the ***Charlottetown*** and the ***School Board*** cases. If that fact is relevant at all, it might go to the issue of damages if and when defamation is proven.

[93] More importantly, there is no claim of anything beyond reputational damages. The claim for negligence must fail. This is a defamation action, not a negligence action.

DEFAMATION

[94] While I have concluded that the appeal must be dismissed for the foregoing reasons, I will deal with the substance of Ayangma's defamation claim for the following reasons: (1) the parties requested that the court do so; (2) the substantive

issues were fully argued by both parties on the motion and on the appeal; (3) whether or not statements are capable of being defamatory is a question of law which can be decided on a summary judgment motion (***Ayangma v. NAV Canada***, 2001 PESCAD 1, paras.22 and 25); and (4) Ayangma has a penchant for commencing actions in defamation when people say things he doesn't like (***Ayangma v. CBC***, 2000 PESCTD 86, ***Ayangma v. Nav. Canada***, 2001 PESCAD 1, ***Ayangma v. CBC et. al.***, 2005 PESCAD 26, ***Ayangma v. Government of Prince Edward Island and Ors.***, 2005 PESCTD 25, ***Ayangma v. Metro Credit Union and Ors.***, 2011 PESC 18) and he should not feel that he has lost his action on a mere technicality.

[95] Free speech and freedom of the press is guaranteed by the Constitution of Canada (s.2(b), ***Constitution Act***). The importance of freedom of the press in a free and democratic society can be underlined by the fact that totalitarian regimes throughout the world seek to put the media under regime control to ensure that their citizens read, hear and see only what the regime wants. The truth tends to be stifled and discourse frowned upon. The law also recognizes the importance of an individual's reputation. The law of defamation seeks to balance these two interests.

[96] I conclude for the following reasons that Ayangma's defamation claim against Saltwire, McKenna and Ross is without merit and should be dismissed.

Issue 4: Is the Ross article defamatory?

[97] In an action against a newspaper or broadcaster, the plaintiff must provide notice of the intended action specifying the language of which he complains (s.14, ***Defamation Act***). The purpose of this notice is to give the defendant time to assess and investigate the matter, and if appropriate, to issue a correction, retraction or apology (***Grossman v. CFTO-T.V. Ltd. et al.*** (1982) 39 O.R. (2d) 498 (ONCA), at para.501). This enures to the benefit of both the plaintiff and the defendant.

[98] The words of which the plaintiff complains must be set out fully and precisely in the statement of claim (***Pylot et al. v. Cariou et al.***, 1987 CanLII 4825 (Sask.Q.B), at paras.15-16; and Brown, Raymond E.: **The Law of Defamation in Canada**, 2d Ed. 1994 (Thomson Canada Ltd.), at 19.3(2)(a)(i)).

[99] Ayangma set out, verbatim, the words of which he complained in his notice under s.14 and in his statement of claim. None of those words are contained in the Ross article. The Ross article is a fair and accurate report of a decision of the Supreme Court of Prince Edward Island in the ***Charlottetown*** case. It contains no comment, was published within 30 days of the decision and contains nothing that is seditious or blasphemous. It is, by virtue of s.12 of the ***Defamation Act*** absolutely privileged. That section reads as follows:

> 12. Report of court proceedings privileged
>
> (1) A fair and accurate report, published in a newspaper or by broadcasting, of proceedings publicly heard before any court shall be absolutely privileged if
>
> (a) the report contains no comment;
>
> (b) the report is published contemporaneously with the proceedings that are the subject matter of the report, or within thirty days thereafter; and
>
> (c) the report contains nothing of a seditious, blasphemous or indecent nature.

[100] Ayangma argues that the hyperlink at the end of the Ross article which enabled a reader to connect to the McKenna article republished the McKenna article. He wrote "*The mere fact the Ross story hyperlinked the readers to the Respondent-publisher webpage, which contained the McKenna story, knowing well what it contained, connects Ross to the McKenna piece*" (Ayangma presentation para. 158, as written).

[101] He urges us to follow the minority opinion in ***Crookes v. Newton***, 2011 SCC 47, which proposed a different test than the test formulated by the majority in that case (para. 46).

[102] Ayangma writes at para. 127 of his presentation as follows:

> The teachings of the Supreme Court of Canada in ***Crookes*** suggests that: Publication of a defamatory statement via a hyperlink should be found if the text indicates adoption or endorsement of content of the hyperlinked text.

[103] We, however, are bound by the majority decision. At para. 14 of ***Crookes*** Abella J. for the majority wrote:

> Nonetheless, Mr. Crookes argued that when the hyperlink has been inserted on a webpage, it should be presumed the content to which the hyperlink connects has been brought to the knowledge of a third party and has therefore been published. For the reasons that follow, I would not only reject such a presumption, I would conclude that a hyperlink by itself, should never be seen as 'publication of the content to which it refers'. (Emphasis in the original)

[104] The only evidence in this case is of a hyperlink. Ayangma's argument, even coupled with his belief, is not evidence that there is anything other than a hyperlink by itself. The Ross article does not republish the McKenna article.

[105] Ayangma attempts to distinguish ***Crookes*** on the basis that in this case the hyperlink was from one Saltwire employee's article to another Saltwire's employee's article while in ***Crookes*** the hyperlink was to a third party. That is a distinction without a difference.

[106] The Ross article is absolutely privileged as a matter of law.

Issue 5: The McKenna article, is it protected by defence of fair comment?

[107] Broadly speaking a defamatory statement is one which has a tendency to lower the reputation of the plaintiff in the estimation of right-thinking members of society. Words that would otherwise be defamatory are not actionable if published on an occasion of privilege or if they are true or where they are an expression of fair comment on a matter of public interest. Freedom of expression is a constitutional right in this country.

[108] In ***Grant v. Torstar***, 2009 SCC 61, the court wrote, at para.31:

> In addition to privilege, statements of opinion, a category which includes any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" (***Ross v. New Brunswick Teachers' Assn.***, 2001 NBCA 62, 201 D.L.R. (4th) 75, at para. 56, cited in ***WIC Radio***, at para. 26), may attract the defence of fair comment. As reformulated in ***WIC Radio***, at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. WIC Radio expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).

[109] Saltwire argues that the six comments of which Ayangma complains are either true statements of fact or expressions of fair comment.

[110] The McKenna article concerned court proceedings and the consumption of court time and resources. This is, unquestionably, a matter of public interest.

[111] While there is an allegation of malice by Ayangma, there is no evidence that could support a finding that the article was actuated by express malice. The onus of showing express malice is on Ayangma.

[112] Thus the focus must be on whether or not the words of which Ayangma complains are fact, in which case they must be true, or comment, in which case they must be recognizable as comment and be an opinion/comment that a person could honestly express on the proven facts.

[113] The McKenna article appeared under the heading "*Commentary*." That is surely an indication that what follows is comment. The article concerned a Supreme Court of Prince Edward Island decision that refused to allow Ayangma to represent his son in an action against the City of Charlottetown. His son, Sebastien, had been searched pursuant to a search warrant wherein the police found a small quantity of cocaine. Although he was charged, the charges were subsequently dropped. On a later occasion he was charged and convicted for trafficking in cocaine and received a two and a half year sentence. Sebastien Ayangma sued the City alleging racial profiling when the police stopped him and found cocaine but dropped the charge.

– **The words of which Ayangma complains**

-- **"***Vexatious litigant actually breaking the law when trying to represent his son***"**

[114] Ayangma takes great exception to the statement. He argues that:

> There appears to be a legal distinction between a finding that the proceeding instituted a litigant is 'vexatious' and a finding that the litigant is "vexatious" litigant. While the former is determined by way of a motion under Rules 20-21 of the **Rules of Civil Procedure**, the latter is commenced by a specific application under s.61 of the **Crown Proceeding**". Para.138 Ayangma's amended factum as written.

[115] Ayangma freely admits that he was declared a vexatious litigant by the Supreme Court of Prince Edward Island but points out that the Court of Appeal overturned that decision. He argues, therefore, that he is not a vexatious litigant and that the statement referred to above is false. I think this parses the language too finely.

[116] The intended audience for this article is the general public, not lawyers or legal scholars. Words in a defamation suit are given their plain and ordinary meaning

(***Ayangma v. NAV Canada***, 2001 PESCAD 1, at paras.28-29). "*Vexatious*" means causing or tending to cause frustration, annoyance or worry. This is the primary meaning given to it by the **Students Oxford Canadian Dictionary**, 2nd Ed. (Oxford University Press, Don Mills, Ontario, 2007).

[117] The word '*vexatious*' is an opinion/comment that a person could honestly hold on these facts. Ayangma agrees that he goes to court often and often alleges discrimination and it is a fact that in this case, he is attempting to represent his son in a suit against the City of Charlottetown alleging racial profiling when they stopped him and found him to be in possession of a quantity of cocaine. One could reasonably conclude from these facts that the litigant, Ayangma, was annoying. That might not sit well with Ayangma but the law of defamation is concerned with reputation, not feelings. The balance of that statement was, at the time it was written, true. A judge of the Supreme Court of Prince Edward Island held that by acting for his son, he was breaching the ***Legal Profession Act***.

> – *"The judges in the courts of Prince Edward Island must shudder when they see Noel Ayangma coming***"**

[118] Ayangma seems to treat this as a statement of fact. He argues that this statement is incorrect. In his affidavit before the motions judge he wrote, at para.8:

> Not only none of the P.E.I. judges ever shudder when they see me, to the best of my observation, but most of P.E.I. judges have been were respectful in court towards me and towards them equally as such there could be no room to either make the comments which are the subject matter of my claim against the defendants. [Ayangma's affidavit, para.8, as written]

[119] In my view this is clearly a comment and not a statement of fact. This is the case of a frequent litigator, frequently litigating discrimination cases, coming to court to hold the police responsible in damages for racial profiling for the offence of stopping his son with a quantity of cocaine. On these facts a comment that judges must shudder is one that a person could honestly express. It is a colloquialism that means that they must be tired of seeing him yet again. A person could honestly think that the judges must be tired of seeing him. The fact that the PEI Judges are respectful towards him means only that the PEI Judges make every effort to be respectful to all litigants regardless of whether they are lawyers or non-lawyers, or whether or not they have any legal skill.

> – *"... usually arguing that he is being discriminated against, always acting as his own lawyer, and almost always losing* **"**

– *"The list of people and institutions he has sued is long and fraught with failure"*

[120] In Ayangma's statement of claim he states this is defamatory because it is: *"false incorrect not only because he does not sue individuals in their personal capacity, but rather institutions"* (para. 22.2 amended statement of claim); and in his affidavit for the motions judge, he purports to have a 46% success rate and therefore it is false to say that he is almost always losing.

[121] Ayangma's statement that he does not sue individuals in their personal capacity but rather institutions, a claim which he repeated in court, is an audacious falsehood which can be easily seen from the following:

1. ***Ayangma v. CBC***, 2000 PESCTD 86 - Ayangma not only sued CBC, but also Sally Pitt, Randy Landry, and Barbara McKenna. This was an action in defamation which was dismissed.

2. ***Ayangma v. Wyatt***, 2001 PESCTD 4: In this case, Ayangma sued Jim Wyatt personally alleging, amongst other things, abuse of process, conspiracy, deceit, political cover up, conflict of interest and discrimination. This action was dismissed.

3. ***Ayangma v. NAV Canada, supra,*** was a defamation action against NAV Canada and John Navaux personally for a statement made by Navaux during the investigation of a complaint. Ayangma actually won at trial but nonetheless he appealed. The losers at trial cross-appealed. The Court of Appeal overturned the trial judge's decision on the basis that the words spoken by Navaux were not defamatory, and in any event, were spoken on an occasion of privilege.

4. ***Ayangma v. Eastern School Board***, 2002 PESCAD 12, was a case in which Ayangma sued, not only the Eastern School Board, but Ruth DeMone, Sherry Gillis, Janet Cullinan, and Carl White. This was an application by Ayangma for finding of contempt of court, an injunction and mandamus application which was dismissed.

5. ***Ayangma v. CBC et al.***, 2005 PESCAD 26, was another defamation action against the CBC and Mitch Cormier and the Canadian Information Network News (CINN) and their employees. When counsel for CBC and Mitch Cormier filed a motion for security of costs February 7, 2005, Ayangma responded with a motion for summary judgment or partial summary judgment against the CBC, Mitch Cormier and CINN staff,

namely Jamie Larter, Daniel John Enright, Andrew Mark Crocken, Christopher Steven Glencross, Megan Alexis Reid Enright, Jason William Gourley, and Tyler Edward Lucock Cormier. Ayangma was ordered to post security for costs and pay costs of the motion.

6. ***Ayangma v. French School Board and Gabriel Arsenault***, 2008 PESCTD 39. In this case Ayangma sued both the Board and Arsenault personally alleging racial discrimination. The case was dismissed.

7. ***Ayangma v. Government of Prince Edward Island & Others***, 2005 PESCTD 25, was a case wherein Ayangma sued the Government in defamation and several other things. He claimed "*malicious defamation*" against Cyndria Wedge for saying "*When you get somebody who over a four year period is going to court 46 times, I would suggest to you that no one is wronged that much*". He lost because, amongst other reasons, the trial judge found the words spoken by Wedge were true (paras.79-84).

8. In ***Ayangma v. Metro Credit Union & Ors.***, 2011 PESC 18, the other defendants were Darrell Theriault and Valerie Zidichouski. The individuals were parents of two students that Ayangma taught. They were sued for alleged comments that they made at a "meet the teacher night" as they were concerned that their "*poor past professional relationship*" with Ayangma might have an adverse impact on their children. Ayangma sued them in defamation for $200,000. and added their employer whom he sued for another $200,000. The action was struck because Ayangma did not plead the words alleged to have been defamatory as he appears to have no idea on what they actually said on "meet the teacher night".

9. In this case Ayangma is suing not only Saltwire but also Ryan Ross and Barb McKenna.

[122] Mr. Ayangma does indeed sue individuals, and furthermore, there is a long list of them.

[123] As to the comment that he is almost always losing in court, Ayangma in his affidavit evidence suggested he has a 46% success rate over two decades. That is a bald allegation with nothing to support it. Ayangma has created a table wherein he has cherry picked nineteen published judgments of the Prince Edward Island Court of Appeal between the years 2000 and 2008. He claims by this table to have a 62% success rate. The articles of which he complains however are written eight years after

this time period. In addition, this table does not include any decision before 2000 or after 2008. The table does not count the approximately twenty or so judgments of the Prince Edward Island Supreme Court, approximately sixteen judgments before the Federal Court, approximately eight judgments of the Federal Court of Appeal and two failed leave applications to the Supreme Court of Canada in the years 2000-2008.

[124] Saltwire responds with its own chart which they state "*summarizes the last written decision in the procedural history of each of Ayangma's matter before the courts.*" They conclude he got eight wins out of 37, 20 losses of 37, i.e. 21% success rate, and seven split victories. The Saltwire table of covers cases from 1998 to 2017 and only cases on PEI.

[125] Ayangma says in his statement of claim "*the plaintiff also states that not only the list of institutions he had sued over a period of 20 years of so, of litigations cannot be said to be long as stated by the defendants, but it is incorrect, false and defamatory his record in court is that of an individual who 'almost always loses in court' as suggested by defendants.*" (Para.22.3 Ayangma's amended statement of claim as written.) Saltwire's chart counted 15 different institutions sued by Ayangma.

[126] In any event, trying to ascertain a success rate is a mug's game. The very fact that Saltwire could come with a "win rate" of approximately 21% shows that the comment that he almost always loses is one that a person could honestly express on the facts of this case. Ayangma's complaint that "*the list of institutions he had sued over a period of twenty years of litigations cannot be said to be long as stated by defendants but it is incorrect, false and defamatory*" cannot withstand even mild scrutiny. The list of individuals and institutions he has sued is indeed long. That part of the statement is definitely true.

- *"It seems now, though, that he really does think he's a lawyer, taking clients."*

[127] Ayangma alleges that "*this statement is also false, incorrect and defamatory as it is crystal clear that he does not believe he is a lawyer nor does he takes clients as suggested by the defendant Barbara McKenna.*" (Para.22.4, Amended statement of claim as written)

[128] Once again, Ayangma confuses fact and comment. This statement is not a fact; it is a comment. Ayangma's own statement of claim proves that the comment is one that a person could honestly express on the facts of this case. He statement of claim states that he is "*not only well known in the Province of Prince Edward Island, but also within the Canadian judicial system having conducted litigations in several jurisdictions including in Prince Edward Island, New Brunswick, Nova Scotia,*

Manitoba, Newfoundland, British Columbia, Quebec and as well as the Federal Court sphere." (Para. 4 amended statement of claim as written)

[129] The Supreme Court in the ***Charlottetown*** case stated that Ayangma was doing many of the things that a lawyer does. Once again, this is a comment that a person can honestly express on the facts of this case.

> – "*The problem is, you can, represent someone unless you are actually a lawyer. If you act as someone's lawyer, but you're not actually lawyer, you break the law." (as written para.12(f) statement of claim)*

[130] Ayangma states that this statement is false as he did not break any laws. (Para.22.5, Amended statement of claim)

[131] However, the McKenna article was referring to the Supreme Court decision in the ***Charlottetown*** case. In that case, the judge found that Ayangma was doing many of the things that lawyers do and the only thing that he wasn't doing was taking payment from his son. The judge ruled that that was a breach of the ***Legal Profession Act***. Hence, he found Ayangma was breaking the law. Therefore, the comment made by McKenna in the article was true at the time it was written.

CONCLUSION

[132] In conclusion, I would not grant leave to appeal the assessment of costs because Ayangma has not raised strong grounds from which an appellate court could find that the motions judge erred in exercising her discretion. The motions judge made no error in finding that the action of defamation was barred by virtue of s. 15 of the ***Defamation Act***.

[133] If the action in defamation was not barred by s.15 of the ***Defamation Act***, the Ross article is a fair and accurate report published in a newspaper of a proceeding before the courts and is absolutely privileged. The McKenna article is a fair comment on a matter of public opinion, and the comments contained therein were ones that any person could honestly express on the facts.

[134] The statement of claim makes it clear that this defamation action is intended to punish the **Guardian** for failing to publish the Court of Appeal decisions in the ***Charlottetown*** and the ***School Board*** cases. That failure to publish is referenced in no less than four paragraphs of the statement of claim: paras.24, 25, 26, and 34.

[135] The law will not permit actions for defamation to be used to intimidate public opinion or restrict freedom of thought (Brown, **Law of Defamation in Canada, supra**,

at 15.2). This action in defamation, feeble as it is, is an abuse of process because it is an attempt to bully and intimidate the media.

[136] The appeal is dismissed with costs on a partial indemnity basis. If the parties cannot agree on costs by thirty days from the date of this decision, then Saltwire will have seven days in which to file their submissions on a bill of costs, and Ayangma will have seven days thereafter to file a response.

_____
Justice John K. Mitchell

I AGREE: _____
Chief Justice David H. Jenkins

I AGREE: _____
Justice Michele M. Murphy